No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL P. ACRI, DOLLAR SAVINGS AND TRUST COMPANY, THE DOLLAR SAVINGS AND TRUST COMPANY OF YOUNGSTOWN, OHIO, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court's memorandum on motions for summary judgment (R. 12-14) is reported at 109 F. Supp. 943. The *per curiam* affirmance by the Court of Appeals (R. 23) is reported at 209 F. 2d 258.

JURISDICTION

The judgment of the Court of Appeals (R. 23) was entered December 17, 1953. The petition for a writ of certiorari was filed on March 16, 1954, and

was granted May 24, 1954 (R. 25). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether certain tax liens held by the United States were subordinate to an inchoate attachment-before-judgment lien accorded by state law to the plaintiff in a civil action, where the federal tax liens arose and were recorded subsequent to the attachment but prior to the entry of judgment in the civil case.

STATUTES INVOLVED

Sections 3670, 3671, and 3672(a) of the Internal Revenue Code of 1939, and the pertinent parts of Sections 11819, 11820, 11826, 11827, 11828, 11836, 11837, 11843, 11847, 11848, 11850 11853, 11854, and 11855 of Page's Ohio General Code Annotated (1938), are set forth in the Appendix, *infra*, pp. 29-38.

STATEMENT

This action was brought by the United States in the United States District Court for the Northern District of Ohio to collect federal income taxes assessed against Michael P. Aeri (herein sometimes referred to as the taxpayer) for the years 1942 to 1946, inclusive, and to foreclose the liens of the United States for such unpaid taxes against the taxpayer's property, including that held in a safe deposit box registered in his name at the Dollar Savings & Trust Company of Youngstown, Ohio. One Oravitz, administrator of the estate of John Oravec, deceased, was made a defendant to the

action because he previously had instituted a suit against the taxpayer in the Court of Common Pleas, Mahoning County, Ohio, to recover damages for the murder of the decedent by the taxpayer and had secured a writ of attachment before judgment against the personal property of the taxpayer held in the above-mentioned safe deposit box. The Dollar Savings & Trust Company also was made a defendant in the action in its capacity as guardian of the estate of the taxpayer, who was incarcerated.

The material facts as stipulated by the parties (R. 8-11), and as found by the District Court (R. 14-15), may be summarized as follows:

On August 6, 1947, Oravitz, as administrator of the estate of John Oravec, deceased, filed a suit for damages in the Court of Common Pleas of Mahoning County, Ohio, against Acri for wrongful death by murder, and on the same date the money, securities and property of Acri contained in his safe deposit box at the Dollar Savings & Trust Company were attached by Oravitz. On January 19, 1949, upon trial of that suit, a judgment for Oravitz in the sum of $18,500 was entered. (R. 9, 14-15.)

In the meantime, after issuance to Oravitz of the writ of attachment but more than a year before Oravitz procured a judgment, federal tax liens arose and notice thereof was duly filed covering all of Acri's property. These liens arose from income taxes assessed by the Commissioner of Internal Revenue against Acri for the years 1942 to 1946, inclusive. The assessment list covering these taxes

was received by the Collector of Internal Revenue on November 18, 1947 (R. 11), and demand for payment was mailed to Aeri on November 19, 1947 (R. 8). On November 21, 1947, a notice of tax lien was filed in the office of the Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served on the Dollar Savings & Trust Company. (R. 8.)[1] This action to foreclose the federal tax lien was commenced on August 11, 1948. (R. 6.)

On June 14, 1948, the Dollar Savings & Trust Company was appointed guardian of the estate of Aeri, who had been incarcerated upon his conviction for the murder of Oravec. On September 11, 1948, the bank inventoried the contents of Aeri's safe deposit box, and currency in the sum of $35,821 and bonds having a total maturity value of $8,675 were found therein. No one had been allowed access to the safe deposit box from the time of the attachment, August 5, 1947, until the inventory was taken. (R. 9-10.)

It was stipulated (R. 10) that the only issue involved was the relative priority of the attachment lien of Oravitz and the tax liens of the United

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[1] The assessment of November 18, 1947, was in the amount of $79,551.80. Thereafter, the Commissioner determined the correct tax liability of Aeri for the years 1942 to 1946, inclusive, to be $71,543.82, which is the amount here involved, and on June 7, 1948, but still prior to the adverse judgment, notice of lien in this reduced amount was filed with the Recorder of Mahoning County, and a second notice of levy for this amount was served on the Dollar Savings & Trust Company. (R. 8-9.)

States. The case was submitted to the District Court on motions for summary judgment filed by the United States and by Oravitz. (R. 12, 14.) The District Court held (R. 12-17) that the attachment lien was superior to the tax liens of the United States. The Court of Appeals affirmed without opinion. (R. 23.)

SUMMARY OF ARGUMENT

Determination of the issue here involved is controlled by this Court's decision in *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47, the principle of which was reaffirmed in *United States* v. *New Britain*, 347 U. S. 81. The instant case involves the same essential facts and the same issue of law as the *Security Trust* case. In each of the cases, liens were acquired by the United States under Section 3670 of the Internal Revenue Code of 1939 against all of the property and rights to property of a delinquent taxpayer by reason of assessments of federal taxes. The assessment lists were received in the respective Collectors' offices and notices of lien were filed in accordance with Section 3672 (a) of the 1939 Code after certain property of the delinquent taxpayer had been attached in connection with a suit against the taxpayer in a local state court, but before judgment was entered in the state court suit. The *Security Trust* case involved an attachment before judgment under California law, while the instant case involves an attachment before judgment under Ohio law.

The status of the local attachment lien in rela-

tion to provisions of federal law for the collection of taxes due the United States is a federal question, and whatever effect the doctrine of relation back may have under state law, it cannot operate to defeat the priority of the federal lien. In the *Security Trust* case, the attachment lien under California law was held to be contingent and inchoate—no more than a *lis pendens* notice that a right to perfect a lien existed—at the time the federal tax liens arose and therefore could not take precedence over the later federal tax liens which arose and had been recorded prior to the entry of judgment in the attachment suit. Examination of the Ohio statute and decisions demonstrates that the attachment lien here involved is equally contingent and inchoate, and dependent for its perfection upon the plaintiff's obtaining a favorable judgment in his suit. Uniformity in the administration of the federal taxing statute requires that the attachment in the instant case be accorded no greater dignity as a matter of federal law than that accorded the attachment lien involved in the *Security Trust* case.

The contingent or inchoate character of an attachment lien under Ohio law is particularly manifest in this case, which involves an attachment issued in connection with a suit brought against the delinquent taxpayer for pecuniary damages in an arbitrary amount for the alleged wrongful death by murder of the plaintiff's decedent. While a suit for wrongful death is permitted by the laws of

Ohio, any recovery is limited to the amount of pecuniary damages suffered by the persons in whose behalf the suit is brought, and the burden is upon the plaintiff to prove both the defendant's liability and the amount of damages recoverable. Neither the filing of the complaint nor the issuance and service of the writ of attachment in any way determines either the liability of the defendant or the amount of the recovery, and at the times the federal tax liens arose and were recorded, the amount of recovery, if any, in the wrongful death suit was speculative and conjectural.

In *United States* v. *New Britain*, *supra*, this Court held that the priority of the statutory liens there involved was to be determined on the principle that "the first in time is the first in right." The opinion makes it clear, however, that the determination of priority of a lien on that basis "must depend on the time it attached to the property in question *and became choate*." (Italics supplied.) In so holding, the Court explicitly noted that the decision was not contrary to the *Security Trust* case, which involved an *inchoate* lien arising out of an attachment before judgment.

Attachment liens are effective under state law for many purposes and serve as notice to others who may have dealings with the delinquent taxpayer, but they depend for their perfection entirely upon the obtaining of a favorable judgment in the related proceeding. To hold that the lien of the United States for its unpaid taxes is inferior

to such a contingent, inchoate lien would postpone the collection of taxes until the rights of an attaching plaintiff are finally determined and could be a serious handicap to the Government in the collection of its taxes. "If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled," as was said in the *Security Trust* case, the tax lien cannot be subordinated to such wholly contingent and undetermined claims against the taxpayer.

ARGUMENT

A Lien of the United States for Its Unpaid Taxes Is Superior to a Prior Inchoate Lien Based on an Attachment Before Judgment Under State Law Which Is Dependent for Its Perfection Upon the Obtaining of a Judgment and the Issuance of Execution in the Related Civil Action

Determination of the issue here presented is controlled by this Court's decision in the case of *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47 (the doctrine of which was recently reaffirmed in *United States* v. *New Britain*, 347 U. S. 81, 86). In this case, as in the *Security Trust* case, the United States, by reason of assessments of federal taxes, acquired a lien under Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 29) upon "all property and rights to property, whether real or personal, belonging to" the delinquent taxpayer which, under Section 3671 of the 1939 Code (Appendix, *infra*, p. 29), attached to such property as of the date the Commissioner's

assessment list was received by the Collector of Internal Revenue. In each case, certain property of the taxpayer was attached prior to the date the federal tax lien arose, but judgment in the attachment proceeding was not entered until after the federal tax lien arose and had been recorded.[2]

In *United States* v. *Security Tr. & Sav. Bk., supra,* one Morrison brought an action on an unsecured promissory note in the Superior Court of San Diego County, California, against one Styliano and his wife, and caused a writ of attachment to issue attaching the interest of the Stylianos in four parcels of real property. Thereafter, but before Morrison obtained judgment, the Commissioner of Internal Revenue assessed federal taxes against Styliano, and notices of lien therefor were duly filed in accordance with Section 3672 (a) of the

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[2] Section 3672 (a) of the 1939 Code (Appendix, *infra*, pp. 29-30) provides that the lien under Section 3670 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien is filed as therein provided. Section 3672 (a) is inapplicable here because judgment was not entered in the attachment suit until after the federal tax lien arose and had been recorded, and the plaintiff in attachment was not, therefore, a "judgment creditor" within the meaning of the statute. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47; *United States* v. *Gilbert Associates*, 345 U.S. 361. See, also, *In re Capitol Cleaners & Dyers*, 233 P. 2d 377 (Utah); *Republic Nat. Life Ins. Co.*, v. *Hedstrom*, 346 Ill. App. 555, 105 N.E. 2d 782; *Samms* v. *Chicago Title & Tr. Co.*, 349 Ill. App. 413, 111 N.E. 2d 172; *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A. 2d 81; *MacKenzie* v. *United States*, 109 F. 2d 540 (C.A. 9th); *United States* v. *Reese*, 131 F. 2d 466 (C.A. 7th); *Miller* v. *Bank of America, N. T. & S. A.*, 166 F. 2d 415 (C.A. 7th); *In re Capital Foundry Corp.*, 64 F. Supp. 885 (E.D. N.Y.).

1939 Code. Morrison later recovered judgment against the Stylianos and recorded an abstract thereof in the office of the Recorder of San Diego County. The issue which reached this Court arose in four suits subsequently brought in the Superior Court of San Diego County involving the above four parcels of real property upon which Morrison had procured an attachment, and to which proceedings Morrison and the United States were made parties. The first suit was to quiet title to one parcel which the Stylianos had sold to the plaintiffs who paid the balance of the purchase price into court. The other three suits were to foreclose separate mortgages on the other three parcels. (*Security Tr. & Sav. Bk., supra*, p. 48; *Winther* v. *Morrison*, 93 Cal. App. 2d 608, 610-611, 209 P. 2d 657.) The issue presented to this Court was whether the California District Court of Appeal (the California Supreme Court having refused to consider the case) erred in holding the prior attachment lien of Morrison superior to the federal tax liens there involved.

The facts of the instant case are essentially indistinguishable. On August 6, 1947, Oravitz, as administrator of the estate of John Oravec, deceased, filed a suit in the Court of Common Pleas of Mahoning County, Ohio, against Acri for $50,000 damages for the wrongful death of Oravec, and on the same date secured a writ of attachment against the personal property of Acri held in a safe deposit box at the Dollar Savings & Trust Company.

Judgment was entered by the Court of Common Pleas in favor of the estate of Oravec in the amount of $18,500 on January 19, 1949. In the meantime, however, the Commissioner of Internal Revenue had assessed federal income taxes against Aeri in the amount of $79,551.80 (subsequently determined to be $71,543.82)[3] which was included on an assessment list received by the Collector on November 18, 1947, and with respect to which notice of lien was duly filed on November 21, 1947. This proceeding to foreclose the Government's tax lien was filed on August 11, 1948 (R. 6), also before judgment was entered in the attachment suit in the Court of Common Pleas.[4]

In sustaining the superiority of the federal tax liens involved in the *Security Trust* case, this Court held (pp. 49-50), as it had in many prior decisions,[5] that the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question, and further held that the doctrine of relation back—which would treat the attachment as merged in the judgment and thus relate the judgment lien back to the date of the attachment—could not operate to de-

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[3] See fn. 1, *supra*, p. 4.

[4] The District Court properly held (R. 13) that it had jurisdiction to determine the issues raised by the Government's foreclosure suit. *Markham* v. *Allen*, 326 U.S. 490; *Commonwealth Co.* v. *Bradford*, 297 U.S. 613; *Wilhoit* v. *Federal Deposit Ins. Corp.*, 143 F. 2d 14 (C.A. 6th).

[5] *See United States* v. *Waddill Co.*, 323 U.S. 353, 356-357, and cases cited; *Illinois* v. *Campbell*, 329 U.S. 362, 371.

feat the priority of the federal lien.[6] It was also held (p. 50) that the attachment lien there involved was "contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists" at the time the federal liens for unpaid taxes arose and as such did not take precedence over the federal liens.

In the instant case the District Court (the Court of Appeals affirming without opinion (R. 23)), while recognizing the principles laid down by this Court in the *Security Trust* case, nevertheless held that "Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding," citing Ohio General Code, Section 11837, Appendix, *infra*, p. 34, and *Illinois* v. *Campbell*, 329 U. S. 362 (R. 13). It then attempted to distinguish the instant case from the *Security Trust* case on the ground that the latter "dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute" (R. 14).

We submit that the conclusion of the District Court is clearly in error. It not only violates the "cardinal principle of Congress" of uniformity in tax matters (*United States* v. *Gilbert Associates*, 345 U. S. 361) but rests upon a construction of California and Ohio law which stresses the form rather than the substance of the matter. In substance and

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[6] Compare *New York* v. *Maclay*, 288 U.S. 290, 293; *MacKenzie* v. *United States*, 109 F. 2d 540 (C.A. 9th); *Miller* v. *Bank of America, N. T. & S. A.*, 166 F. 2d 415 (C.A. 9th).

reality, the attachment proceeding under Ohio law differed in no material respect from that provided under California law. Since the "effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States* v. *Security Tr. & Sav. Bk., supra,* p. 49), this Court is free to determine the substance of the matter. To do so it is necessary to examine the Ohio law[7] and then to contrast it with the provisions of California law which were involved in *Security Trust.*

The attachment here involved was authorized by Section 11819 of the Ohio General Code (Appendix, *infra,* pp. 30-31), which provides that in a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant on any one of several grounds, including a suit based on the ground that the defendant has fraudulently or criminally contracted the debt, or incurred the obligation for which suit is about to be brought or has been brought. The rights and liabilities of a party to an attachment proceeding, and the provisions relating to the procuring and enforcing of attachments authorized by Section 11819, are set out in detail in succeeding sections of the Ohio General Code.[8] Section 11837 of the Ohio General

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[7] Applicable provisions of the Ohio General Code, Annotated (1938), are printed in the Appendix, *infra*, pp. 30-38.

[8] A suit for wrongful death is authorized by Section 10509-166 of the Ohio General Code, and the issuance of an attachment against property of the defendant in such an action ap-

Code, relied upon by the District Court (R. 13), provides in part that—

> An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with a written notice hereinbefore mentioned. * * *

The latter section of the Ohio General Code does not vest in the plaintiff in attachment any interest in the property of the defendant, nor does it segregate the attached property from his general estate so as to prevent the attaching of the Government's lien for taxes. Compare *Illinois* v. *Campbell*, *supra*. Instead, it merely specifies the date on which the attachment becomes effective, and makes the garnishee liable to the plaintiff in attachment for all property of the defendant in his hands and money and credits due from him to the defendant. This, also, is the substance of the California statute involved in *United States* v. *Security Tr. & Sav. Bk.*, *supra*.[9] This and other pertinent pro-

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pears to be proper. See Secs. 11819 and 11845 of the Ohio General Code; *Montanari* v. *Haworth*, 108 Ohio St. 8, 14-16, 140 N. E. 319.

[9] Deering's California Code of Civil Procedure (1941 ed.):

> Sec. 537 [When and actions in which attachment may issue]. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of

visions of the Ohio General Code make it clear that when the writ of attachment or garnishment is properly executed it merely places the attached property in a form of *custodia legis* pending final judgment in the attachment proceeding. The Ohio statute provides generally how the sheriff shall execute the order of attachment,[10] and "When it is personal property, and can be come at, he shall take it into his custody, and hold it subject to the order of the court." Section 11826 of the Ohio General Code (Appendix, *infra*, p. 32). Section 11827 of the Ohio General Code (Appendix, *infra*, pp. 32-33) authorizes the sheriff to deliver the property levied upon to the person in whose possession it is found upon execution by the latter of satisfactory bond

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any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

* * * * *

Sec. 542a. [Pocket Supplement (1947)] [Lien on realty: When effective: Duration and extension.] The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; * * *

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the recording with the recorder of an abstract of the judgment in the action. * * *

[10] A return of the officer whose duty it is to execute the writ which fails to show compliance with its terms is insufficient to give the court jurisdiction over the property. *See Green v. Coit*, 81 Ohio St. 280, 90 N. E. 794.

to the plaintiff in double the amount of the appraised value of the property, and Section 11828 (Appendix, *infra*, p. 33) provides that if in the case of a garnishment the officer cannot get possession of the property, he must leave with the garnishee a copy of the order of attachment, with a written notice that he appear in court and answer —which was done here, except that it does not appear whether an answer was filed by the bank in the attachment suit as provided by Section 11847 of the Ohio General Code (Appendix, *infra*, p. 35).

So far as material here, Section 11848 of the Ohio General Code (Appendix, *infra*, pp. 35-36) authorizes the garnishee to deliver to the officer serving the writ, or to the court, the property of the defendant in his possession and be discharged from further liability to the defendant to that extent. Under Section 11850 (Appendix, *infra*, p. 36), *if* the garnishee appears and answers as directed, *and* it is discovered that at or after service of the order of attachment he was possessed of property of the defendant, or was indebted to him, or either,

> the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs.

The property of Michael Aeri here involved which was the subject of the attachment was not delivered

by the Trust Company to the sheriff or the court; it does not appear that the Trust Company gave bond as contemplated by Section 11850 of the Ohio General Code; and no proceeding as provided by Section 11851 of the Ohio General Code in case of such failure appears to have been taken. Apparently the parties were content to allow the contents of Acri's safe deposit box to remain in the custody of the Trust Company, which it has held as guardian of Acri's estate since its appointment as such on June 14, 1948.

Section 11853 of the Ohio General Code (Appendix, *infra*, pp. 36-37) provides that:

> Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right.

Section 11854 of the Ohio General Code (Appendix, *infra*, p. 37) provides that if judgment in the action on which the attachment is based be rendered for the defendant, the attachment shall be dissolved and the property attached, or its proceeds returned to him, and Section 11855 (Appen-

dix, *infra*, pp. 37-38) provides that if judgment shall be rendered for the plaintiff, it shall be satisfied as follows:

> So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and execution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

It is clear from the foregoing provisions that an attachment under Ohio law does not give to plaintiff a choate lien—that it is a mere *lis pendens* notice that a right to perfect a lien exists. See *United States* v. *City of New Britain, supra*, pp. 84, 86.

To support its conclusion that the California statute dealt with in the *Security Trust* case, *supra*, gives no such effectiveness to attachment proceedings and liens as does the Ohio statute here involved, the District Court said (R. 16) that the Ohio courts have characterized the attachment lien under Ohio law as an "execution in advance", citing

Rempe & Son v. *Ravens*, 68 Ohio St. 113, and *Green* v. *Coit*, 81 Ohio St. 280, and accord it equal standing with an execution lien, citing *Shorten* v. *Drake*, 38 Ohio St. 76. But the state court's characterization, whatever the effect of the lien under state law, is not controlling here. Compare *United States* v. *Waddill Co.*, 323 U.S. 353, 356-357, involving a landlord's lien under Virginia law which the Virginia Supreme Court of Appeals had characterized as fixed and specific and not merely inchoate.

Substantially the same characterization of an attachment under California law was relied upon by the California District Court of Appeal in *Winther* v. *Morrison*, 93 Cal. App. 2d 608, 209 P. 2d 657, reversed by this Court in *United States* v. *Security Tr. & Sav. Bk., supra*. In that case the California District Court of Appeal, citing *Porter* v. *Pico*, 55 Cal. 165, 174, quoted from 3 Cal. Jur. 402, to the effect that "It [an attachment under California law] is, in effect, an incipient execution —an execution, so to speak, in advance of trial and judgment." (*Id.*, pp. 611-612.) Thus, it was upon the same basis there as here that the lower courts held that the attachment lien was superior to the subsequent tax liens of the United States. But in *United States* v. *Security Tr. & Sav. Bk., supra*, this Court rejected the premise of the state court's decision and concluded that under the law there involved (p. 50):

> The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three

> years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—a mere *lis pendens* notice that a right to perfect a lien exists.

Thus it is clear that the realities of the situation govern. And, when so considered, it is manifest that the attachment here involved, like the attachment involved in the *Security Trust* case, gave the plaintiff in attachment no right to proceed against the property unless and until he obtained a judgment in the main proceeding. As is true of an attachment under California law, numerous contingencies might arise that would prevent the attachment lien under Ohio law from ever becoming perfected by a judgment awarded and recorded. If anything, the attachment lien here involved was even more contingent when the federal tax lien arose and was recorded than was the attachment lien involved in the *Security Trust* case, which was premised on a promissory note in a definite amount. Here the attachment was based upon a suit for pecuniary damages in an arbitrary amount of $50,000 (and the order of attachment was in the same amount) for the alleged wrongful death of Oravec. The legal liability of Acri, if any, remained to be established by the evidence, and under Section 10509-166 of the Ohio General Code the jury could give judgment only for "such damages as it may

think proportioned to the *pecuniary* injury resulting from such death, to the persons, respectively, for whose benefit the action was brought." (Italics supplied.) See *Kennedy* v. *Byers*, 107 Ohio St. 90, 140 N. E. 630. The amount due the plaintiff in attachment was in no way determined at the time the attachment issued or at the time the federal tax lien arose. Issuance of the attachment went no further in establishing either the validity or the amount of the plaintiff's claim than did the filing of his complaint on which it was based. It was merely a notice of a claim, the amount of which, if any, could not be foretold with any degree of certainty before judgment. This is far different from an assessment for local taxes, such as was involved in *United States* v. *New Britain, supra*, the amount of which is prima facie correct.

In this respect, the decision in *Illinois* v. *Campbell*, 329 U. S. 362, relied upon by the District Court (R. 13), not only does not support, but is directly contrary to, its decision. The decision in that case makes it clear that as a minimum requirement (p. 375),

> the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States* v. *Knott*, 298 U.S. 544, 549-551; (2) the amount of the lien, *United States* v. *Waddill Co.*, 323 U.S. at 357-358; and (3) the property to which it attaches, *United States* v. *Waddill*

Co., supra; United States v. *Texas* [314 U.S. 480], *supra; New York* v. *Maclay, supra. It is not enough that the lienor has power to bring these elements, or any of them, down from broad generality to the earth of specific identity.* [Italics supplied]

While lack of definiteness as to the property subject to the state lien was an important consideration in *Illinois* v. *Campbell, supra,* so was it also in *United States* v. *Waddill Co.,* 323 U.S. 353, and *United States* v. *Texas,* 314 U.S. 480. However, in all three cases this Court also emphasized that the definiteness as to amount likewise is an essential factor in determining whether local statutory liens are specific and perfected liens. In *United States* v. *Texas, supra,* while this Court pointed out (p. 487) that the "property devoted to or used in his business as a distributor," to which the state lien for taxes attached, "is neither specific nor constant," it added: "But a more important consideration is that the *amount* of the claim secured by the lien is unliquidated and uncertain." (Italics supplied.) And in *United States* v. *Waddill Co., supra,* in holding that the amount claimed for rent was uncertain, this Court said (pp. 357-358): "The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled to a set-off."

In view of the demonstrated inchoate character of the attachment lien here involved, the only basis on which the decisions below can be sustained is

by application of the doctrine of relation back—which this Court rejected in the *Security Trust* case as contrary to the realities of the case.[11] The State of Ohio has, for purposes of state law, made an attachment binding on the property from the

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[11] Two secondary reasons given by the District Court as a basis for its decision are without merit. First, even if "The property subject to the present liens is constructively in the custody of the state court by reason of the attachment," as stated by the District Court (R. 13), such constructive custody could not prevent the federal lien from attaching. Compare *Illinois* v. *Campbell*, *supra*, p. 376. And it could not make the present attachment lien any more choate than the attachment lien in *United States* v. *Security Tr. & Sav. Bk.*, *supra*. Secondly, although the Trust Company, as guardian of Acri, had denied any tax liability in its answer, as stated by the District Court (R. 12, 15), this denial is of no effect in view of the stipulation of facts subsequently filed with the court, wherein it was stipulated on behalf of Dollar Savings & Trust Company, as guardian of Acri, "that there is no issue as to the amount of the taxes assessed against the defendant Michael P. Acri" (R. 9), and it was further stipulated by the parties that the only issue in the case is the relative priority of the federal tax lien and the attachment lien (R. 10-11). The Trust Company is the duly appointed guardian of the estate of Acri and under Ohio law (Sections 10507-1 *et seq.*, and particularly Section 10507-15) it was the duty of the Trust Company, as such guardian, to defend this action on behalf of Acri. See *Campbell* v. *Park*, 32 Ohio St. 544, 560-562. While the stipulation states that the Trust Company is "acting only as a disinterested stake holder with reference to the moneys and assets now remaining in their possession in the safety deposit box or by virtue of receipts turned over to them in the form of rentals" (R. 9), this was true only prior to the trust company's appointment as guardian. It was made a defendant in its capacity as such guardian, and was acting within its authority in making the above stipulations. Accordingly, it was error for the District Court to conclude, in the face of these stipulations, that "an intent to admit the tax liability legally can not be attributed to it in the face of its denial in its answer." (R. 13.)

time of service. Section 11837 of the Ohio General Code. This statutory preference is not binding on the Federal Government.[12] As this Court pointed out in *United States* v. *New Britain, supra*, p. 86, "Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbi-

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[12] Since the celebrated opinion of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, where it was held (p. 435) that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government", this Court has uniformly held that the laws of a state cannot bind the United States in its rights. E.g., the priority granted the United States in the payment of its debts cannot be defeated by state insolvency laws (*Field* v. *United States*, 9 Pet. 182, 201); the tax liens of the United States are not subject to state recording laws (*United States* v. *Snyder*, 149 U.S. 210); a partnership under state law may nevertheless be an association taxable as a corporation for federal income tax purposes (*Burk-Waggoner Assn.* v. *Hopkins*, 269 U.S. 110); a state law cannot affect the right of the United States to levy and collect a federal estate tax (*Florida* v. *Mellon*, 273 U.S. 12); the United States is not bound by provisions of state law limiting the filing of claims against the estate of a decedent (*United States* v. *Summerlin*, 310 U.S. 414); the United States is not bound by a state statute of limitations (*United States* v. *Thompson*, 98 U.S. 486; *United States* v. *Nashville, &c., R'y Co.*, 118 U.S. 120; *Stanley* v. *Schwalby*, 147 U.S. 508; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126). See, also, *Morgan* v. *Commissioner*, 309 U.S. 78, 80-81, and fn. 5; *Burnet* v. *Harmel*, 287 U.S. 103, 110.

trary time even before the amount of the tax, assessment, etc., is determined." See, also, *United States* v. *Snyder*, 149 U.S. 210, 214. Compare *Illinois* v. *Campbell*, *supra*, p. 375.

In the *New Britain* case, the Supreme Court of Errors of Connecticut had stated that the liens of the city were specific and perfected. While pointing out that such characterization of a lien by the state court is not conclusive against the Federal Government, this Court accepted the state court's characterization as to specificity since the city's liens attached to specific parcels of real property, and added (p. 84) that its liens "may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established". It then held (pp. 85-86) that the priority accorded the United States by R. S. Sec. 3466 is absolute, but that Section 3670 of the 1939 Code does not in terms confer priority upon federal tax liens, and in the absence of a showing of insolvency the priority of the statutory liens there involved was to be determined by the principle of law that "the first in time is the first in right", and that "Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question *and became choate.*" (Italics supplied.)

That the principle of first in time, first in right, does not apply, however, where, as here, the prior adverse lien is only a contingent or inchoate lien—a mere *lis pendens* notice that a right to perfect a

lien exists—is made clear by the statement in the *New Britain* case that the decision there is not inconsistent with *United States* v. *Security Tr. & Sav. Bk.* for the reason that (p. 86):[13]

> The *Security Trust* case involved an inchoate attachment lien that had not ripened into a judgment at the time the federal tax liens attached. We noted that "[n]umerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded." 340 U.S., at 50. Thus, the attachment lien was "merely a *lis pendens* notice that a right to perfect a lien exists." *Ibid.* Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined. Accordingly, we concluded in *Security Trust* "that the tax liens of the

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[13] The new Internal Revenue Code of 1954 makes no substantive changes in the federal tax lien provisions here involved. See Secs. 6321, 6322 and 6323 of the 1954 Code (P.L. 591, 83d Cong., 2d Sess.); H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576.

> United States are superior to the inchoate attachment lien * * *". *Id.*, at 51.

In sum, there is no substantive difference between an attachment lien under the statutes of Ohio here involved and under the attachment statutes involved in *United States* v. *Security Tr. & Sav. Bk., supra*. Contrary to the conclusion of the District Court (R. 14), an attachment before judgment is no more effective under Ohio law than under California law. Formal or procedural differences between the statutes do not provide a valid basis for distinction if there is to be uniformity in the administration of the federal taxing statutes. An attachment before judgment does not determine the rights of the plaintiff in attachment. The so-called lien thereby created is effective under state law for many purposes. It serves as notice to others who may have dealings with the defendant. But it depends for its perfection entirely upon obtaining a favorable judgment in the related proceeding. Pending the entry of such judgment it is merely a *lis pendens* notice of a right to perfect a lien. To hold that the lien of the United States for taxes is subordinate to such a contingent lien would postpone the collection of taxes until the rights of an attaching plaintiff are finally determined. "If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, "as this Court said in the *Security Trust* case, *supra* (p. 51), the lien cannot be subor-

dinated to wholly contingent and undetermined claims against the delinquent taxpayer.

CONCLUSION

The decision of the court below is erroneous. The judgment below should be reversed.

Respectfully submitted,

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SEPTEMBER, 1954.

APPENDIX

Interral Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any

mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

Page's Ohio General Code, Annotated (1938):

SEC. 11819. *Grounds of attachment.*—In a civil action for the recovery of money, at or

after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

* * * * *

(6) Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

* * * * *

(8) Has property or rights in action, which he conceals;

* * * * *

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; * * *

* * * * *

SEC. 11820. *Affidavit for order of attachment; contents.*—An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing;

(1) The nature of the plaintiff's claim;

(2) That it is just;

(3) The amount which the affiant believes the plaintiff ought to recover, and

(4) The existence of any one of the grounds for an attachment enumerated in such section.

* * * * *

SEC. 11826. *How order executed.*—The sheriff shall execute the order of attachment without delay. He shall go to the place where the defendant's property is, and there, in the presence of two freeholders of the county, declare that, by virtue of the order, he attaches the property at the suit of the plaintiff. Then with the freeholders, who must be first sworn by him, he shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and freeholders, and returned with the order. When the property attached is real property, the officer shall leave with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order. When it is personal property, and can be come at, he shall take it into his custody, and hold it subject to the order of the court. (R. S. Sec. 5528.)

SEC. 11827. *When property may be delivered to persons with whom found.*—The sheriff shall deliver the property attached to the person in whose possession it was found, upon his executing, in the presence of the sheriff, a bond to the plaintiff, with sufficient

surety, resident in the county, to the effect that the parties to it are bound, in double the appraised value of the property, that it or its appraised value in money will be forthcoming to answer the judgment of the court in the action. If it appears to the court that any part of such property has been lost or destroyed by unavoidable accident, the value thereof must be remitted to the person so bound. (R. S. Sec. 5529.)

SEC. 11828. *Service of garnishee.*—When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. Sec. 5530.)

SEC. 11836. *Form of return.*—The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their

names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. Sec. 5537.)

SEC. 11837. *When property and garnishee bound.*—An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. Sec. 5538.)

SEC. 11843. *How attached property disposed of.*—The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as

are provided in respect to money deposited in lieu of bail. (R. S. Sec. 5544.)

SEC. 11847. *Appearance and answer of garnishee.*—After the written notice is issued as hereinbefore provided, the garnishee shall appear and answer within the time allowed the defendant or defendants to answer the petition upon which the attachment was granted. Under oath, he shall answer all questions put to him touching property of every discription, and credits of the defendant in his possession or under his control and truly disclose the amount owing by him to the defendant, whether due or not in the case of a corporation, any stock held therein by or for the benefit of the defendant, at or after the service of notice. (R. S. Sec. 5547.)

SEC. 11848. *Garnishee may pay money into court or to sheriff.*—A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs. When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in

force from the time of its service until the trial of the cause to determine the claim, debt or demand of the creditor and bind all such earnings due at the time of service, and which will become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor. (R. S. Sec. 5548.)

SEC. 11850. *Disposition of property in hands of garnishee.*—If the garnishee appears and answers and on his examination it be discovered that at or after, the service of the order of attachment and notice upon him, he was possessed of property of the defendant, and was indebted to him, or either, the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs. (R. S. Sec. 5550.)

SEC. 11853. *Judgment against garnishee.*—Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant

in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. Sec. 5553.)

SEC. 11854. *Judgment for defendant.*—If the judgment in the action be rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds returned to him. (R. S. Sec. 5554.)

SEC. 11855. *Proceedings after judgment for plaintiff.*—If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property, and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and exe-

cution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant. (R. S. Sec. 5555.)

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